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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(7)

FRANCISCO JAVIER LABOY ROBLES : CIVIL ACTION  
v. :  
TODD BUSKIRK, et al. : NO. 06-5023

**FILED**

FEB 15 2007  
MICHAEL E. KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

M E M O R A N D U M

SHAPIRO, J.

FEBRUARY 2,  
JANUARY 24, 2007

Plaintiff, a prisoner, has filed a pro se 42 U.S.C. § 1983 civil rights complaint against Northampton County Prison (NCP) Warden Todd Buskirk; Deputy Warden Roger Bulava; Treatment Coordinator William Sweeney; Safety Administrator John McGeehan; Treatment Officer Lt. Jose Garcia; Northampton County District Attorney John Morganelli; and NCP inmate Luis Merced.

Plaintiff alleges that he was assaulted and injured by inmate Luis Merced, resulting in injuries that required medical treatment. Despite his claim that he was the victim of the assault, plaintiff was charged with institutional misconduct, found guilty and sentenced to punitive confinement. Plaintiff also was criminally charged with aggravated and simple assault, for which he was tried in the Northampton County Court of Common Pleas. He was convicted of these crimes and sentenced to imprisonment for 46 to 72 months.

Plaintiff claims that his constitutional rights were violated because: (1) he was charged with and convicted of institutional misconduct without sufficient evidence, and without

review of a videotape of the incident that he requested and which he believes would prove his innocence; (2) the defendants failed to adequately protect him from being harmed by inmate Luis Merced; (3) he was charged with criminal assault only after he attempted to prove that he was innocent of institutional misconduct; (4) he was convicted of criminal assault without sufficient evidence, and without production of the aforementioned videotape of the incident; and (5) he was not provided any outdoor recreation when he "did a prior of disciplinary time."

Plaintiff seeks the following relief: (1) "disclosure" of all evidence from his criminal case; (2) "disclosure" of the videotape of the subject incident; (3) "disclosure" of his innocence by the "Northampton County Courthouse;" (4) damages for injuries arising from the alleged assault by inmate Luis Merced; (5) damages for his "suffering mental and physical and feelings;" and (6) damages for wrongful imprisonment.

With his complaint, plaintiff requests leave to proceed in forma pauperis. Because it appears he is unable to pay the cost of commencing this action, leave to proceed in forma pauperis is granted.

**I. STANDARD OF REVIEW**

Section 1915(e)(2) of Title 28 of the United States Code provides that "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal - (i) is frivolous or malicious; (ii) fails to

state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."

## II. DISCUSSION

### A. Institutional Misconduct

Plaintiff's claim that he was wrongly charged with institutional misconduct does not state a violation of his constitutional rights. See Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986), cert. denied, 485 U.S. 982 (1988); Flanagan v. Shively, 783 F. Supp. 922, 931-32 (M.D. Pa.), aff'd, 980 F.2d 722 (3d Cir. 1992), cert. denied, 510 U.S. 829 (1993).

Likewise, plaintiff's claim that he was convicted of institutional misconduct without sufficient evidence and denied review of a videotape that he believes would prove his innocence does not state a violation of his constitutional rights. The Supreme Court in Sandin v. Conner, 515 U.S. 472 (1995), held that, although state prison regulations may create protected liberty interests under the Due Process Clause,

these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 483.

The fact that plaintiff was convicted of misconduct and sanctioned to disciplinary confinement and the loss of privileges does not suggest an "atypical and significant hardship" on

plaintiff in relation to the "ordinary incidents of prison life." Sandin, 515 U.S. 472 at 484. Such action is the type of deprivation ordinarily contemplated by a prison sentence when determined necessary by prison officials. Thus, plaintiff's claim that he was convicted of institutional misconduct without consideration by prison authorities of evidence that he considers to be exculpatory fails to rise to the level of a violation of his constitutional rights and must be, and is, dismissed.

**B. Failure to Protect from Harm**

Plaintiff claims that he was the victim of an assault that occurred in "Housing Unit C-tier, at 7:45 p.m.," and seeks monetary relief from "Northampton County Prison" because he "was in danger when [he] was assaulted . . ." The Court concludes from these assertions that plaintiff is claiming that prison officials failed to adequately protect him from harm by another inmate. However, because plaintiff fails to state which, if any, prison employee was aware that plaintiff was at risk of harm and failed to take reasonable measures to prevent such harm, he fails to state a colorable violation of his civil rights and this claim must be dismissed. Plaintiff may reassert this claim, if he chooses, in an amendment to this complaint in which he cures this deficiency. See Farmer v. Brennan, 511 U.S. 825, 832 (1994) (to state a claim that prison officials failed to provide adequate protection, a prisoner must assert that a prison employee failed to take reasonable measures to protect him from a known risk of harm).

**C. Malicious Prosecution, and Wrongful Conviction and Confinement**

Plaintiff claims that prison officials and the Northampton County District Attorney decided to criminally prosecute him only after he attempted to prove that he was innocent of institutional misconduct. Plaintiff asserts that, despite his efforts, the aforementioned videotape of the subject assault was not produced as evidence at his trial, and he believes that he was convicted of criminal assault without sufficient evidence. He is requesting damages for wrongful conviction and confinement.

With respect to plaintiff's claim for damages arising from Northampton County District Attorney John Morganelli's involvement in his prosecution, the doctrine of absolute immunity shields prosecutors from liability for actions related to their official duties. Imbler v. Pachtman, 424 U.S. 409, 417-19 (1976). Prosecutors are absolutely immune from liability for money damages under § 1983 for acts "within the scope of [their] duties in initiating and pursuing a criminal prosecution." Id. at 410. Because nothing in this complaint suggests that Mr. Morganelli acted outside the scope of his prosecutorial duties, plaintiff's claim for damages against him is dismissed.

In Heck v. Humphrey, 512 U.S. 477 (1994), the United States Supreme Court held that:

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by

a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 486-87 (footnotes omitted). District courts are directed to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."

Id. Thus, unless the plaintiff can demonstrate that the conviction or sentence has been invalidated, the complaint must be dismissed.

Here, plaintiff's claim that he was maliciously prosecuted and denied available exculpatory evidence, if proven, would "necessarily imply the invalidity of his conviction or sentence." Id. However, since plaintiff has not demonstrated that his conviction or sentence has been invalidated, his claim for damages arising from his criminal prosecution must be dismissed without prejudice. See Shelton v. Macey, 883 F. Supp. 1047, 1050 (E.D. Pa. 1995) (determining that Heck mandates dismissal of plaintiff's claim without prejudice if and when his state court conviction is legally invalidated.)

**D. Request for Judicial Review of Plaintiff's Criminal Conviction**

It is apparent from plaintiff's claim that he was wrongly convicted, and from his request that his innocence be "disclosed" as a form of relief, that he is seeking the invalidation of his criminal conviction and sentence through this civil rights action. However, because a finding in plaintiff's favor on this issue would invalidate his conviction and sentence,

a habeas corpus action filed after plaintiff has exhausted available state remedies, rather than a § 1983 action, is the appropriate vehicle for plaintiff's request. Heck v. Humphrey, supra at 481-82; see also Preiser v. Rodriguez, 411 U.S. 475 (1973). Accordingly, plaintiff's claim that this Court invalidate his criminal conviction is dismissed.

**E. Alleged Assault by Inmate Luis Merced**

Plaintiff claims that Luis Merced assaulted and seriously injured him. In order to bring a civil rights action in this Court, a plaintiff must allege that a person acting under color of state law deprived him of his constitutional rights. Kost v. Kozakiewicz, 1 F.3d 176, 185 (3d Cir. 1993) (listing elements of a civil rights claim). Because nothing in this complaint suggests that Luis Merced, an inmate, acts under color of state law, this action for redress of an alleged constitutional rights violation may not be brought in this Court. Accordingly, plaintiff's claim against Luis Merced is dismissed.

**F. Insufficient Recreation**

Plaintiff claims that he informed Warden Todd Buskirk that he "never see the outdoor recreation when [he] did a prior of disciplinary time," [sic] upon discovering that the NCP Inmate Handbook called for one hour of outdoor recreation five times a week for prisoners in disciplinary confinement. However, plaintiff does not clearly state whether Warden Buskirk was aware of this issue while plaintiff was in disciplinary confinement, or whether he was merely informed after the fact.

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FEB 05 2007

MICHAEL E. KONE, Clerk  
By                      Dep. Clerk

AND NOW, this 2<sup>d</sup> day of February, 2007, in accordance  
with the accompanying memorandum, IT IS ORDERED that:

1. Leave to proceed in forma pauperis is GRANTED  
pursuant to 28 U.S.C. § 1915(b);

2. The Complaint is DISMISSED as legally frivolous  
pursuant to 28 U.S.C. § 1915(e)(2), with leave to amend as set  
forth in the accompanying memorandum; and

3. The Clerk of Court is directed to CLOSE this case  
statistically.

BY THE COURT:

Norma L. Shapiro  
NORMA L. SHAPIRO, J.

*2/6/07 Mailed to:  
Francisco Javier Laboy Robles*